Yebet bt Saman & Ors (sued on behalf of himself and 76 other people of Semaq Beri as listed in 'Appendix A') v Foong Kwai Long & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-01(NCVC)(A)(W)-416–12 OF 2013
ABDUL AZIZ AB RAHIM, MAH WENG KWAI AND PRASAD ABRAHAM JJCA
4 DECEMBER 2014

Civil Procedure — Originating summons — Conversion into writ — Whether High Court should have converted originating summons ('OS') to writ and heard oral evidence on facts in interests of justice — OS filed by natives sought declaratory relief on encroachment into their customary lands — Affidavits filed by respective parties raised contentious issues of fact — Whether High Court's dismissal of OS simply on question of law not only inappropriate but wrong in decision — Whether appellants had vested rights in common law to seek declaratory relief — Whether those rights not removed by passing of Aboriginal Peoples Act 1954

The appellants, who belonged to the Semaq Beri subgroup of the Senoi category of *orang asli*, filed an originating summons ('OS') against the respondents in the High Court seeking, inter alia, declaratory relief over the encroachment of their customary lands covering an area of about 7,000 acres ('the lands') which included settlements, grave sites, orchards and ancestral ceremonial sites. The appellants claimed they had continuously lived on the lands and relied upon its wildlife and produce for their livelihood, customs and practices, just as their forefathers had done since at least 1850. The appellants alleged that since the middle of September 2010, the first and second respondents through their servants and/or agents began conducting logging activities on the lands and cleared areas for the planting of oil palm trees. The appellants filed the OS when the encroachment activities began to get closer to their settlements. While the appellants based their claim on vested rights under the common law, the fourth, fifth and sixth respondents argued that those common law rights had been removed with the passing of the Aboriginal Peoples Act 1954 ('the Act'). The High Court dismissed the OS resulting in the instant appeal.

Held:

(1) The appellants were entitled in common law to seek a declaration of their rights to occupy and use the lands. The appellants' right to derive their livelihood from the said lands was vested in them at common law and that right was not excluded by the Act. The Act did not anywhere provide

that it had been passed to exclusively deal with the issue of aboriginal peoples' rights. It followed that the common law rights of the appellants could co-exist with the said Act (see paras 8–9 & 11–12).

(2) The affidavits filed by the respective parties raising various factual issues, such as whether the appellants had been in continuous occupation of the lands or whether they had abandoned or waived their prescriptive rights under common law, needed to be resolved by viva voce evidence. Justice would have been better served if the High Court had converted the OS into a writ and heard oral evidence in disposing of the matter (see paras 13–14).

[Bahasa Malaysia summary

Perayu-perayu, daripada subkumpulan Semaq Beri kategori orang asli Senoi, memfailkan saman pemula ('SP') terhadap rersponden-responden di Mahkamah Tinggi memohon, antara lain, relief perisytiharan terhadap pencerobohan tanah adat mereka yang melitupi kawasan lebih kurang 7,000 ekar ('tanah') yang termasuk penempatan, tapak kubur, dusun dan tapak istiadat nenek moyang. Perayu-perayu mendakwa merka terus tinggal di atas tanah tersebut dan bergantung ke atas hidupan liar dan hasilnya untuk mata pencarian mereka, adat dan amalan, seperti nenek moyang mereka telah lakukan sekurang-kurangnya sejak tahun 1850. Perayu-perayu mendakwa bahawa sejak pertengahan bulan September 2010, responden-responden pertama dan kedua melalui pekerja dan/atau ejen mereka mula menjalankan aktiviti pembalakan ke atas tanah dan menerangkan kawasan-kawasan untuk menaman pokok kelapa sawit. Perayu-perayu memfailkan SP apabila aktiviti pencerobohan mula mendekati kawasan penempatan mereka. Sementara perayu-perayu mendasarkan tuntutan mereka atas hak yang diletakhakkan di bawah *common law*, responden keempat, kelima dan keenam berhujah bahawa hak *common law* tersebut telah disingkirkan dengan kelulusan Akta Orang Asli 1954 ('Akta'). Mahkamah Tinggi menolak SP tersebut menyebabkan rayuan ini.

Diputuskan:

(1) Perayu-perayu berhak dari segi *common law* untuk memohon perisytiharan hak mereka untuk menduduki dan mengguna tanah tersebut. Hak perayu-perayu untuk mendapatkan punca pencarian mereka dari tanah tersebut diletakhakkan kepada mereka pada *common law* dan hak tersebut tidak dikecualikan oleh Akta. Akta tidak di mana-manapun memperuntukkan bahawa ia telah diluluskan untuk secara ekslusif mengendalikan isu hak orang asli. Oleh itu hak *common law* perayu-perayu boleh wujud bersama dengan Akta tersebut (lihat perenggan 8–9 & 11–12).

(2) Afidavit-afidavit yang difailkan oleh pihak masing-masing

membangkitkan pelbagai isu fakta, seperti sama ada perayu telah berterusan menduduki tanah tersebut atau sama ada mereka telah meninggalkan atau mengetepikan hak preskriptif di bawah *common law*, perlu diselesaikan oleh keterangan viva voce. Keadilan boleh diberikan dengan adil jika Mahkamah Tinggi telah menukarkan SP kepada writ dan mendengar keterangan lisan dalam melupuskan perkara tersebut (lihat perenggan 13–14).]

Notes

For a case on conversion into writ, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) para 6047.

Cases referred to

Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors [1998] 2 MLJ 158, CA (not folld)

Raja Mokhtar bin Raja Yaacob v Public Trustee, Malaysia [1970] 2 MLJ 151 (refd)

Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677, FC (folld)

Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal [2006] 1 MLJ 256; [2005] 3 CLJ 555, CA (folld)

Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd [1992] 2 MLJ 217, SC (folld)

Legislation referred to

Aboriginal Peoples Act 1954
National Land Code

Appeal from: Originating Summons No 24NCVC-321–12 of 2012 (High Court, Kuantan)

Steven Thiru (Yogeswaran Subramaniam, R Sarengapani, Darmain Segaran and Lee Lyn Ni with him) (RS Pani & Assoc) for the plaintiffs.
Nor Zakiah Abdul Majid (Zakiah) for the first and second defendants.
Ahmad Hanir bin Hambaly (Rohatul Akmar bt Abdullah with him) (State Officer, Pahang Legal State Offices) for the third and fifth defendants.
Noor Hisham bin Ismail (Kairul Fazly bin Kamarudin with him) (Senior Federal Counsel, Attorney General's Chambers) for the fourth and sixth defendants.

Prasad Abraham JCA (delivering judgment of the court):

[1] This appeal arises out of a decision of the High Court dated 29 October 2013, dismissing the plaintiffs' claim without no order as to costs as agreed between parties hence the appeal before us. For purposes of

convenience we will refer to the appellants as the plaintiffs and the respondents as the defendants.

[2] This appeal raises several interesting points of law and fact over the plaintiffs' claim to the said land, the subject matter of this dispute based on common law and customary rights.

[3] The background facts:

(a) the plaintiffs belong to the Semaq Beri subgroup of the 'Senoi' category of the *orang asli* (see pp 135–136, AR 2(1));

(b) their purported claim to the said lands (ie Kg Mengkapur) cover an area of approximately 7,000 acres ('the said land'). It includes two primary settlement areas namely, 'Çhahabuk' and 'Tumpesel'. Apart from settlements, there are also grave sites, orchards and ancestral ceremonial sites on the 'customary lands'. A detailed description of the said lands is set-out in pp 138–1440, AR 2(1);

(c) the plaintiffs claimed they have lived on and have had an interest in the said lands since at least 1850 (see para 8, p 141, AR 2(1);

(d) the plaintiffs also claimed that they have maintained a close connection to their said lands through their continuous occupation and use of the same. Various flora and fauna on the said lands (and in fact the said land itself) are used as part of the plaintiffs' customs and practices. The Semaq Beri of Kg Mengkapur are inextricably linked to the customary lands (see pp 146–154, AR 2(1);

(e) during the emergency (1948), the plaintiffs' ancestors were forced by the government to relocate to Kg Paya Bungor and were informed that such relocation would only be temporary. Kg Paya Bungor is located about 12 kilometres away from the customary lands (pp 142–143, AR 2(1));

(f) it is noteworthy that the plaintiffs' ancestors never abandoned the customary lands during this period as they continuously returned to the said lands to tend to/harvest their orchards for collection of forest produce, for hunting and fishing, and to visit and maintain places of cultural, spiritual and religious importance (see pp 143–144, AR 2(1));

(g) in 1970, after the end of the emergency, a number of the Semaq Beri of Kg Mengkapur households returned permanently to the customary said lands and continued to occupy the same (se p 144, AR 2(1));

(h) it is noted that the matters stated above concerning the plaintiffs as members of the Semaq Beri tribe and their occupation of, and interest in, the said lands are also found in the expert evidence of Dr Collin George Nicholas, an independent expert on the socio-historical aspects of the

orang asli community (see pp 180–189, AR 2(1));

(i) the unlawful encroachment into the customary lands began in mid September 2010. The plaintiffs discovered a notice containing the name of a contractor/agent of the second defendant and the details of his license to conduct logging activities in the south-western part of the said lands (see para 44, p 155, AR 2(1));

(j) next, the plaintiffs also found that contractors/agents of the second defendants and/or the first defendant had placed stone markers and paint markers on forest trees in various locations in the said lands for the intended logging activities (see para 45, pp 155–156, AR 2(1));

(k) subsequently, and without the consent of the plaintiffs, the contractors/agents of the second defendant and/or the first defendant began cutting down the trees and removing timber from the said lands. Further, they had also begun clearing parts of the said land and planting oil palm. The plaintiffs made police reports (see paras 46–47, p 156 AR 2(1));

(l) then, from mid 2011 onwards, the plaintiffs were verbally directed by the contractors/agents of the second defendant not to enter parts of their said lands which had been cleared as stated above (see para 48, p 157, AR 2(1));

(m) moreover, the contractors/agents of the second defendant refused to adhere to the plaintiffs' demands, through their solicitors, to desist from trespassing on the said lands and to vacate as well as remove all equipment and/or machinery from the said lands (see paras 49–50 p 157, AR 2(1));

(n) in or around December 2011, the second defendant and/or the first defendant further encroached into the said lands approximately 2 km away from the Tumpesel and Chahabuk villages (see para 51, p 158 AR 2(1));

(o) the plaintiffs then commenced the instant action in the High Court on 14 December 2012 (see pp 20–94, AR 1 and pp 95–163, AR 2(1)); and

(p) none of the defendants have disputed the encroachment of the plaintiffs the said land.

ISSUES PERTAINING TO THE CUSTOMARY RIGHTS OF THE PLAINTIFFS TO THE SAID LAND AND IN COMMON LAW

[4] The question to be first asked does such a right exist. The plaintiffs' claim is that the plaintiffs' customary title are recognised in common law provided it can be shown the existence of distinctive aboriginal communities occupying the said land as their forefathers had done before what this means, evidence that shows that whether the said land had been continuously

occupied by the plaintiffs and their families who had inherited the said land from their forefathers. The traditions and customs of the Semaq Beri tribe have been maintained by the plaintiffs from generation to generation. The plaintiffs have occupied the said land since the 1850s and the said land are distinctive to the plaintiffs' culture.

[5] The defendants and in particular the fourth to the sixth defendants have invited the court to revisit all the authorities on this point. The senior federal counsel ('the SFC') argues that common law rights have been excluded by virtue of the Aboriginal Peoples Act 1954 (Act 134) revised July 1974 ('the said Act'). The argument of the SFC for the defendants is that with the advent of the said Act the same provides for the rights of the plaintiffs exclusively and therefore the plaintiffs are estopped from pleading and averring to the applicability of the common law. The defendants have also raised several issues of facts and law in relation to the plaintiffs' right.

[6] The plaintiffs argue that the rights of the plaintiffs are crafted on principles of common law. This is supported by several decisions of the Federal Court and the Court of Appeal and decisions of the Australian High Court and other Commonwealth jurisdictions which were referred to us. In the case of *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors,* reported in [1998] 2 MLJ 158 a decision of the Court of Appeal where it was held:

> 1) The court entirely agreed with the views expressed by the judge upon the issue of liability. Those views accorded with the jurisprudence established by our courts and by the decisions of the courts of other jurisdictions which deserve much respect. It is now settled beyond argument in our jurisdiction that deprivation of livelihood may amount to deprivation of life itself and that state action which produces such a consequence may be impugned on well-established grounds. The judge was therefore correct in concluding that where state action has the effect of unfairly depriving a citizen of his livelihood, adequate compensation is one method of remedying the harm occasioned by such action pursuant to art 13 of the Federal Constitution.

[7] The decision was upheld by the Federal Court when leave to appeal was refused. The focus of the court's attention in the aforesaid case is the concept of 'aboriginal inhabited place' under the said Act. We observe that the arguments of the senior federal counsel (the SFC) for the fourth and sixth defendants mirror exactly what the SFC argued in *Adung bin Kuwau*'s case and we quote from the judgment of His Lordship Gopal Sri Ram JCA (as he then was) in delivering the leading judgment of the court:

> The Act makes it plain that it does not exclude the rights vested in the respondents at common law. The appellants' argument was fallacious because ss 5 and 6 of the

Act which were relied upon by the appellants are concerned with an aboriginal area. However, the respondents' case was not based upon a claim that the land in question was an aboriginal area. They relied upon the absence of anything in the Act that excludes their common law rights to derive their livelihood from land which is an 'aboriginal inhabited place' (see p 164D-I). A

The first of these passages appears at p 50 of the appeal record and reads ([1997] 1 MLJ 418 at p 430): B

> My view is that, and I get support from the decision of *Calder*'s case (*Calder v A-G of British Columbia* (1973) 34 DLR (3d) 145) and *Mabo*'s case (*Mabo & Ors v State of Queensland & Anor* (1986) 64 ALR 1), the aboriginal peoples' rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial. I believe this is a common law right which the natives have and which the Canadian and Australian courts have described as native titles and particularly the judgment of Judson J in *Calder*'s case at p 156 where His Lordship said the rights and which rights include '... the right to live on their land as their forefathers had lived and that right has not been lawfully extinguished ...'. I would agree with this ratio and rule that in Malaysia the aborigines' common law rights include, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers. C D E

The next passage is at pp 52–53 of the appeal record ([1997] 1 MLJ 418 at pp 430–431). In it the judge said: F

> These people live from the hunting of animals in the jungle and the collection of jungle produce. Those are the only source of their livelihood and income. Can these rights be taken away by the government without compensation? At a glance this could be done, but upon looking further and deeper, it is my opinion that compensation ought to be made. This can be discerned from s 11 of the Act, guarantees adequate compensation for land, bearing rubber or fruit trees claimed by the aboriginal people, that is alienated. It is clear to me that the land on which those trees are planted is either a reserve land for the aboriginal people or an area where they had a right to access, which is a jungle reserve. In the first case, there is no problem because it is their reserved land. In the second case, it is clear that the land belongs to the state but they were planted by the aborigines. As such, adequate compensation must be made for these trees but not for the land. In the present case, I am of the view that adequate compensation for the loss of livelihood and hunting ground ought to be made when the land where the plaintiffs normally went to look for food and produce was acquired by the government. The compensation is not for the land but for what is above the land over which the plaintiffs have a right. G H I
>
> The Act does not limit the aborigines' rights therein. In order to determine the extent of aboriginal peoples' full rights under law, their rights under common

A law and statute has to be looked at conjunctively, for both these rights are complementary, and the Act does not extinguish the rights enjoyed by the aboriginal people under common law.

The third passage, which is at p 59 of the appeal record ([1997] 1 MLJ 418 at pp 433–434), reads:

B

I will now proceed to examine whether the plaintiffs were deprived of proprietary rights protected by the Federal Constitution art 13(1).

At the time the defendants entered into an agreement with the Government of the Republic of Singapore and built a dam in the Linggiu valley, the plaintiffs' C rights of free access into Linggiu valley and to harvest the fruits of the jungle were unchallenged and recognised in law. It is the building of the dam that brought the plaintiffs' freedom of movement within the Linggiu valley, which is guaranteed by the Federal Constitution art 9(2), to an end and subsequently extinguished the plaintiffs' rights to collect the forest produce which are recognised at common law and statutory law.

D

The plaintiffs' statement that the forest was a source of their livelihood was not rebutted by the defendants and neither was there evidence that there was a break in the continuous occupation and traditional connection in the land for their livelihoods.

E It has been long recognised under our law that when a person is deprived of any proprietary right under an executive exercise pursuant to powers given by statute, that person must be compensated.

The final passage is at p 65 of the record of appeal ([1997] 1 MLJ 418 at p 436). It reads:

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For a case involving the plaintiffs, I would state that the plaintiffs had suffered deprivation of the following types of interest in the land:

(1) deprivation of heritage land;

(2) deprivation of freedom of inhabitation or movement under art 9(2);

G

(3) deprivation of produce of the forest;

(4) deprivation of future living for himself and his immediate family; and

(5) of future living for his descendants.

H

We can find nothing objectionable in the foregoing passages. Indeed, we entirely agree with the views expressed by the learned judge in his judgment upon the issue of liability. Those views accord with the jurisprudence established by our courts and by the decisions of the courts of other jurisdictions which deserve much respect. It is now settled beyond argument in our jurisdiction that deprivation of livelihood I may amount to deprivation of life itself and that state action which produces such a consequence may be impugned on well-established grounds. See *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ

481. The learned judge was therefore correct in concluding that where state action has the effect of unfairly depriving a citizen of his livelihood, adequate compensation is one method of remedying the harm occasioned by such action pursuant to art 13 of the Federal Constitution.

We are therefore unable to agree with the submissions of the learned state legal adviser and his criticism of the learned judge's judgment. A reading of the Act makes it plain that it does not exclude the rights vested in the respondents at common law. As pointed out by the learned judge, and by counsel for the respondents during argument before us, the Act in s 2 creates a distinction between an 'aboriginal area' and an 'aboriginal inhabited place'. These are defined as follows:

> 'Aboriginal area' means an aboriginal area declared to be such under this Act.
>
> 'Aboriginal inhabited place' means any place inhabited by an aboriginal community which has not been declared to be an aboriginal area or aboriginal reserve.

Sections 5 and 6 of the Act which were relied upon by the appellants are concerned with an aboriginal area. However, the respondents' case is not based upon a claim that the land in question was an aboriginal area. They rely upon the absence of anything in the Act that excludes their common law rights to derive their livelihood from land which is an 'aboriginal inhabited place'. Herein lies the fallacy in the appellants' argument.

[8] We subscribe to the views expressed by His Lordship in the Court of Appeal in *Adung*'s case. We observe also that the said Act does not anywhere provide that the said Act has been passed to exclusively deal with the issue of aboriginal peoples' rights. By way of analogy, the National Land Code provides an exclusive machinery for registration of title in Peninsular Malaysia and we quote:

> An Act to amend and consolidate the laws relating to land and land tenure, the registration of title to land and of dealings therewith and the collection of revenue therefrom within the States of Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Trengganu and the Federal Territory of Kuala Lumpur and for purposes connected therewith.

[9] It follows that common law rights of the plaintiffs can co-exist with the said Act. We also considered the following cases in support of that proposition ie *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555, *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677.

[10] The SFC acting for the fourth and the sixth defendants invited this court to revisit this area of the law and argued quite forcibly that common law has no place in addressing the plaintiffs' claims, as they would be governed by the said Act. However we are unable to agree, in view of the present state of

A authorities on the point. We are bound by the decisions of the Federal Court and would adopt the principles enunciated in those cases. Further decisions from common law jurisdictions are instructive. In this regard we are reminded of the words of Raja Azlan Shah J (as His Royal Highness then was) in the case of *Raja Mokhtar bin Raja Yaacob v Public Trustee, Malaysia* [1970] 2 MLJ 151, B where he said and we quote:

> Although the decisions of the Commonwealth Courts are not binding, they are entitled to the highest respect. In my view it is important that I should apply the principles formulated in the Australian and English cases so that the common law and its development should be homogenous in the various sections of the C Commonwealth.

[11] We would therefore hold that the plaintiffs are entitled to seek declaration of rights to occupy and use of the said land in common law.

D

[12] We therefore disagree with the learned judge and hold that the plaintiffs' rights vested in them, in common law, a right to derive their livelihood from the said land which is not excluded by the said Act. On that ground we would allow the appeal.

E

[13] However to determine the sustainability of the plaintiffs' claim, or the absence of it, several issues have been raised in the various affidavits filed in support of the respective parties and they can be encapsulated as set-out below:

F (a) whether the plaintiffs were in continuous occupation of the said land;

(b) whether the plaintiffs had abandoned or waived their prescriptive rights under common law; and

(c) any other factual issues that may have a bearing on the plaintiff's case.

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[14] The various affidavits filed contain issues of fact that need to be resolved by viva voce evidence and the learned judge should have converted this matter to a writ and justice could have been better served. It is our view this matter should have been disposed of by way of oral evidence. We echo the words of the H Supreme Court in the case *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* reported [1992] 2 MLJ 217 from which we quote at p 232:

> We have given anxious consideration to the facts of this case and submissions of both counsel on the point under discussion, and in the light of the view that we have taken and the uncertainties of the various facts as they are made available before the I court, and in view of the authorities cited above, we have come to the conclusion that the better decision under the circumstances is to allow the appeal, and pursuant to O 28 r 8(1) order the proceedings to continue as if begun by writ and the parties to deliver their pleadings in accordance with O 18 and that the order made by the learned judge should be set aside.

[15] On the upshot the appeal is allowed:

(a) with no order as to costs;

(b) the matter is remitted to the High Court to be heard on the issues of fact raised, by a different judge;

(c) we direct the affidavit in support of the originating summons affirmed on 14 December 2012 to stand as the statement of claim, the affidavit in reply of each of the defendants to stand as their defence respectively, and subsequent affidavits filed to constitute subsequent pleadings; and

(d) early trial of this matter is hereby ordered.

Order accordingly.

Reported by Ashok Kumar